IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

AGUA CALIENTE BAND OF CAHUILLA INDIANS, and DOES I-XX,

Petitioner and Defendant,

vs. 3 Civil C043716

SACRAMENTO COUNTY SUPERIOR COURT Sacramento County Superior Court Case No. 02AS04545

Respondent.

FAIR POLITICAL PRACTICES COMMISSION, a state agency,

Real Party in Interest and Plaintiff.

/

REAL PARTY'S RETURN TO PETITION FOR WRIT OF MANDATE

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INTRODUCTION

In its most fundamental sense, this case involves the affirmative assertion of the sovereign right and power of the State of California, secured under the Guarantee Clause and the Tenth Amendment to the United States Constitution, to control its own electoral processes and protect the integrity of its elections and legislative processes through enforcement of the Political Reform Act (Gov't Code §§ 81000-91014) ("PRA"), enacted by voter initiative in 1974. The PRA charges the California Fair Political Practices Commission ("FPPC") with its administration and enforcement. In the regular course of its statutory duties, the FPPC brought this action to enforce the PRA against the petitioner Agua Caliente Band of Cahuilla Indians ("Tribe"). The Tribe asserted that it is exempt from enforcement of the PRA by virtue of the federal doctrine of tribal sovereign immunity from suit. The superior court properly ruled that extension of this court-created doctrine so as to abrogate rights reserved to the States by the Guarantee Clause, would violate the Tenth Amendment to the United States Constitution.

A related case, in which respondent court ruled against the FPPC by granting the defendant tribe's motion to quash, *FPPC v. Santa Rosa Indian Community of the Santa Rosa Rancheria*, Sacramento Superior Court Case no. 02AS04544, is pending on appeal in this court, appeal no. C044555.

These cases present questions of first impression in California. At least one other state has refused a tribal campaign committee's request to prevent enforcement of state campaign contribution laws against the committee. *Minnesota State Ethical Practices Board v. Red Lake DFL Committee,* 303 N.W.2d 54 (Minn. 1981). The United States Supreme Court, however, has not yet considered any case presenting the question of whether states have authority to enforce their own laws protecting the

integrity of state elections against Indian tribes. *No* state or federal appellate court has determined that tribes have authority to interfere with states' rights of self-government, either as a matter of federal common law or by virtue of any federal statute. *No* case has held that tribes participate in state elections on a basis different from any other citizen or association.

This case involves an issue of great urgency to Californians and to the FPPC. The Tribe is a multi-million dollar contributor to California election campaigns and an active lobbyist employer. Other federally recognized Indian tribes are similarly involved in efforts to influence the political processes of the State of California through contributions of money at both the state and local levels.

The FPPC must comply with its statutory mandate to enforce the PRA vigorously for the benefit of all of its citizens, including petitioner's members. Cal. Const. Article III, section 3.5; Gov't Code § 81002(f). This court should affirm respondent's ruling and resolve these important questions, so that the FPPC and all Californians will know that the FPPC may enforce the PRA against the largest contributors to California political campaigns.

RETURN BY ANSWER TO PETITION FOR EXTRAORDINARY RELIEF

Real party in interest California Fair Political Practices Commission (FPPC) admits, denies and alleges:

1. Admits the allegations of paragraph 1 of the petition.
2. Admits the allegations of paragraph 2 of the petition.
3. Admits the allegations of paragraph 3 of the petition.
4. Admits the allegations of paragraph 4 of the petition.
5. Admits the allegations of paragraph 5 of the petition.

6. Admits the allegation of paragraph 6 of the petition that the Honorable Loren E. McMaster is the judge whose ruling is to be reviewed. Judge McMaster is not assigned for all purposes to this action.

7. Admits the allegations of paragraph 7 of the petition.

8. Admits the allegation of paragraph 8 that respondent court denied petitioner's motion to quash and denies the allegation that the respondent in so doing acted in excess of its jurisdiction. The remaining allegation, that "there has been no Congressional authorization for this lawsuit and the Tribe has not waived its immunity" constitutes a legal argument and on that basis, the real party denies the remaining allegations of paragraph 8.

9. Answering paragraph 9 of the petition, real party alleges that respondent's ruling speaks for itself and on that basis denies the allegations of paragraph 9.

10. Admits the allegations of paragraph 10.

11. Denies the allegations of paragraph 11.

12. Admits that affirming respondent's order would require petitioner to defend against real party's action pending in respondent court and, except on the basis of that admission, denies the allegations of paragraph 12.

Real party in interest alleges the following additional facts:

13. It is anticipated that federally recognized Indian tribes will be playing major roles as financial contributors in the upcoming recall election, which will determine the highest office-holder in state government. The continuing uncertainty regarding federally recognized Indian tribes' compliance with the PRA, and the ability of the people of the State of California to be informed of that involvement, is a matter that urgently needs to be addressed. Resolution of this petition is, therefore, a matter of some urgency in that California has scheduled the recall election for October 7, 2003.

14. The Tribe, according to its own records, made contributions of more than one million dollars to California political candidates and committees from January 1, 1998 to June 30, 1998 and in the 1998 calendar year the Tribe made contributions of more than $7,500,000 to statewide ballot initiatives (Ex. 1 to Petition, Second Amended Complaint, p. 3, ¶ 11)(App. Vol. 1, p. 0003). The Tribe contributed to more than 140 candidates for elective state office (*Id.* at p. 3, ¶ 11)(App. Vol. 1, p. 0003). From July 1, 1998 to December 31, 1998 the Tribe made contributions totaling at least $6 million (*Id.* at p. 6, ¶ 21)(App. Vol. 1, p. 0006). The Tribe made similar contributions in 2001 (*Id.* at pp. 3-4, ¶ 12)(App. Vol. 1, pp. 0003-0004) and 2002 (*Id.* at p. 4, ¶ 13)(App. Vol. 1, p. 0004).

15. Notwithstanding its status as a major contributor committee, the Tribe failed to file full and timely disclosure reports required by the PRA, thereby depriving voters of information necessary to make informed decisions. It did not file its report for the period January 1, 1998 to June 30, 1998 until October 2000, more than two years after the due date (*Id.* at p. 5, ¶ 19)(App. Vol. 1, p. 0005). The Tribe filed an untimely report for the period July 1, 1998 through December 31, 1998 in March 1999 but only filed an amended final statement in November 2000, nearly two years after the due date (*Id.* at p. 6, ¶ 22)(App. Vol. 1, p. 0006).

16. More recently, in connection with the Proposition 51 ballot initiative, the Tribe failed to disclose a contribution of $125,000 to the Yes on Proposition 51 Committee, using the Planning and Conservation League as an intermediary. If it had passed, Proposition 51 would have committed the expenditure of $15 million in public funds per fiscal year, for 8 years, for a rail line from Los Angeles to Palm Springs, including a train terminal at the Tribe's Coachella Valley casino. (*Id.* at pp. 6-7, ¶¶ 26-29)(App. Vol. 1, pp. 0006-0007).

17. In 1998 the Tribe was one of the top 5 contributors to Yes on Proposition 5, Californians for Indian Self-Reliance, contributing more than $2,300,000 to the most expensive initiative campaign to that point in California history (*Id.* at p. 8-9, ¶ 37)(App. Vol. 1, pp. 0008-0009). The Tribe entirely failed to disclose or only made untimely reports of several last-minute in-kind contributions to Yes on Proposition 5 totaling some $1 million (*Id.* at pp. 8-13, ¶¶ 37-61)(App. Vol. 1, pp. 0008-0013).

18. The First Amended Complaint details additional undisclosed or late disclosures of contributions in the November 1998 general election, the March 2001 special election, the November 2001 general election, and the March 5, 2002 primary election (*Id.* at pp. 13-15, ¶¶ 62-84)(App. Vol. 1, pp. 0013-0015).

19. The Tribe's quarterly lobbyist employer reports, required by the PRA, failed to identify for any quarter of 2001 the bills that were the subject of the Tribe's lobbying efforts. (*Id.* at pp. 16-18 ¶¶ 85-98)(App. Vol. 1, pp. 0016-0018).

20. It is not possible to know the true extent of the Tribe's contributions or lobbyist employer activity, unless the Tribe complies with the PRA's disclosure requirements. Nor can the FPPC accurately audit the recipients' compliance. Certainly, voters cannot make informed decisions, when reports are untimely or incomplete. (Dec. of Alan Herndon, Chief Investigator for the Enforcement Division of the FPPC (Ex. 14 to Petition at pp. 3-5 ¶¶ 4-10, Ex. A)(App. Vol. 3, 0694-0696, 0699-0700); (Dec. of James K. Knox, Executive Director of California Common Cause, ¶¶ 13-17)(App. Vol. 3, pp. 0713-0714).

21. The Tribe intends to influence California voters beyond its reservation borders on issues affecting all Californians. (Dec. of Alan Herndon, ¶ 11)(App. Vol. 3, pp. 0696-0697); (Dec. of Dan Schek,

Investigator III of the FPPC, ¶¶ 5-8, Exs. A and B)(App. Vol. 3, pp. 0703, 0704, 0705-0708).

22. California has a significant interest in protecting the integrity of its elections and legislative processes from the corrupting influence of significant campaign contributions and lobbying activities by special interests. (Dec. of Karen Getman, Immediate Past Chairman of the FPPC, ¶¶ 4-12)(App. Vol. 3., pp. 0519-0522); (Dec. of Bill Jones, Immediate Past Secretary of State, ¶ 3)(App. Vol. 3, pp. 0502-0503); (Dec. of Bob Stern, former FPPC General Counsel and President of the Center for Governmental Studies, ¶ 6-7)(App. Vol. 2, pp. 0414); (Dec. of James K. Knox, ¶¶ 15-16)(App. Vol. 3, p. 0714).

23. There is no tradition of tribal immunity with respect to enforcement of laws analogous to the PRA and other states successfully enforce their laws, including at least one state court action. (Dec. of George Dunst, Legal Counsel for the Wisconsin State Elections Board, ¶¶ 4-5)(App. Vol. 2, pp. 0491-0500); (Dec. of Jeffrey Garfield, General Counsel Executive Director and General Counsel of the Connecticut Elections Enforcement Commission, ¶ 5)(App. Vol. 2, 0335-0336); (Dec. of Alan Plofsky, Executive Director and General Counsel of the Connecticut State Ethics Commission, ¶¶ 5, 7)(App. Vol. 2, pp. 0395); (Dec. of Jeanne Olson, Executive Director of the Minnesota Campaign Finance and Public Disclosure Board, ¶¶ 4, 9-14)(App. Vol. 2, pp. 0358, 0359-0360).

DEFENSES

Real party in interest alleges the following defenses:

1. The FPPC must comply with the statutory mandate that it enforce the PRA vigorously for the benefit of all of its citizens, including petitioner's members. Cal. Const. Article III, section 3.5; Gov't Code § 81002(f).

2. The Guarantee Clause, Article IV, section 4 through the Tenth Amendment to the United States Constitution, protects California's right to adopt such protections for its electoral and legislative processes as the PRA and the right of initiative without interference by Congress.

3. The petition fails to state facts or provide a record sufficient to support issuance of a writ of mandate or other extraordinary relief.

4. Petitioner is not entitled to relief because respondent did not act in excess of its jurisdiction nor abuse its discretion.

PRAYER

Wherefore, real party in interest prays that:

1. The petition for writ of mandate or other extraordinary relief be denied;

2. Respondent's ruling denying petitioner's motion to quash be affirmed;

3. Real party recovers its costs in this proceeding;

4. This court grant any other relief it deems just and proper.

Dated: August _____, 2003

Respectfully submitted,

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By_____
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VERIFICATION

The plaintiff and real party in interest California Fair Political Practices Commission is a public entity and on that basis does not verify this answer. Code of Civ. Proc. §§ 446, 1089; *see Crowl v. Commission On Professional Competence,* 225 Cal. App. 3d 334, 342 (1990).

MEMORANDUM OF POINTS AND AUTHORITIES

ISSUES

The Sacramento County Superior Court correctly determined that the Tribe's federal common law immunity from suit does not extend to bar this action by the California Fair Political Practices Commission (FPPC) to enforce the Political Reform Act (PRA) against the petitioner Agua Caliente Band of Cahuilla Indians (the Tribe). The order denying the motion to quash should be affirmed, and the petition should be denied.

The Tribe asserts that respondent acted in excess of its jurisdiction in denying the Tribe's motion to quash based on its federal common law sovereign immunity from suit. Specifically, the Tribe asserts that its sovereign immunity from suit is absolute because there has been no congressional authorization for this lawsuit and the Tribe has not waived its immunity.

The Tribe's petition presents questions of first impression in California:

1. Did the States, through Article IV, section 4, the Guarantee Clause of the United States Constitution, and the Tenth Amendment, reserve the power to protect their sovereign governments so that Congress is barred from abrogating--expressly or by implication--state court enforcement of laws protecting the integrity of state elections and legislative processes from corruption by large monetary contributors, including Indian tribes?

2. Does *Kiowa v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), which applied the court-created doctrine of tribal sovereign immunity from suit to off-reservation commercial conduct, bar state court enforcement of the PRA against the Tribe, notwithstanding the State's reserved powers under Article IV, section 4 and the Tenth Amendment?

It is important that these questions be resolved and that respondent's ruling be affirmed. The FPPC has no choice but to comply with the statutory mandate that it enforce the PRA vigorously for the benefit of all of California's citizens, including petitioner's members. Cal. Const. Article III, section 3.5. This court should resolve these questions, so that the FPPC and all Californians will know that the FPPC may enforce the PRA against the largest contributors to California political campaigns, including in connection with the gubernatorial recall election now scheduled for October 7, 2003.

ARGUMENT

I. INTRODUCTION

The FPPC agrees that the Tribe, by virtue of its unique status, has rights of tribal self-government assiduously protected by Congress. This case in no way implicates those rights nor threatens that unique status. What is threatened is the State's sovereign power to protect the integrity of its elections and legislative processes.

It is the position of the FPPC, adopted by the superior court in this case, that California's Political Reform Act, Gov't Code §§ 81000 et seq., constitutes an expression of core sovereign powers by the People of the State of California, powers reserved to the State under the Guarantee Clause, through the Tenth Amendment of the United States Constitution.

Absent an "unmistakably clear" statement of intent to restrict those powers, Congressional interference will not be presumed and, in the absence of express Congressional action, the California courts should not defer to Congress on the basis of the court-created doctrine of sovereign

immunity from suit or the Indian Commerce Clause, Article I, § 8, cl. 3 of the United States Constitution.

II. ENFORCEMENT OF THE POLITICAL REFORM ACT IS AN EXERCISE OF POWERS RESERVED TO THE STATES UNDER THE UNITED STATES CONSTITUTION

Petitioner errs in asserting that respondent should have determined only whether Congress affirmatively authorized the exercise of state court jurisdiction or whether petitioner affirmatively waived its sovereign immunity from suit. (Petition p. 8). Respondent's ruling correctly determines that the States did not defer to Congress on such matters, when they delegated power over Indian commerce through the Indian Commerce Clause, Article I, § 8, cl. 3, but reserved the power to protect their republican form of government from congressional interference, through the Guarantee Clause, Article IV, § 4 and the Tenth Amendment.

Respondent court neither created an exception to the doctrine of sovereign immunity from suit nor balanced state and tribal interests. Rather, the superior court properly declined to extend the court-created doctrine in derogation of sovereign rights reserved to the States under the United States Constitution. Remarkably, the petition does not address the authority relied upon by the FPPC and respondent court in reaching its decision.

A. THE STATES RESERVED POWER TO PROTECT THEIR SOVEREIGNTY THROUGH THE GUARANTEE CLAUSE AND THE TENTH AMENDMENT

As will be shown, the States, through the Guarantee Clause and the Tenth Amendment, expressly reserved the power to protect their elections and to determine the qualifications of their public officials. The PRA is an expression of those sovereign powers. Interference by Congress in this

sensitive area at the "heart of representative government" cannot be presumed, but must be unmistakably clear.

The United States Supreme Court has recognized that the Constitution established a system of "dual sovereignty." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). This "federalist structure of joint sovereigns" (*id.* at 458) was a check on abuses of governmental power and was critical to ensure the protection of our fundamental liberties (*id.*).

While the Constitution establishes a national government with broad, often plenary authority over certain matters, the founding document "specifically recognizes the States as sovereign entities." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 , 71, n. 15 (1996); *accord, Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) ("[T]he States entered the federal system with their sovereignty intact").

The States surrendered many of their powers to the new federal government, but they retained "a residuary and inviolable sovereignty." *Printz v. United States*, 521 U.S. 898, 919 (1997). Various textual provisions of the Constitution assume the States' continued existence and active participation in the fundamental processes of governance. *Id.* (citing Art. III, § 2; Art. IV, §§ 2-4; Art. V).

Most importantly for this case, the Guarantee Clause, Art. IV, § 4,

> "presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights . . .." Printz, 521 U.S. at 919. (citing *Helvering v. Gerhardt*, 304 U.S. 405, 414-415 (1938)).

The Guarantee Clause of the United States Constitution provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, ...

Residual state sovereignty was also implicit in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8. Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to "allay lingering concerns about the extent of the national power." *Alden v. Maine,* 527 U.S. 706, 713-14 (1999). The Tenth Amendment "confirms the promise implicit in the original document: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'" *Id.* U.S. Const., Amdt. 10; *see also Printz*, 521 U.S. at 919.

The FPPC recognizes that the scope of the Tenth Amendment's limitations on congressional power remains a subject of debate. *See Seminole Tribe of Florida v. Florida*, 517 U.S. at, 184 n.65 (Souter, J., dissenting). The United States Supreme Court has not settled whether the Amendment is violated only by a "formal command from the National Government directing the State to enact a certain policy" or whether the prohibition extends further. *Id.*

Arguing that the Tenth Amendment is not a "source" of state power, petitioner cites *New York v. United States*, 505 U.S. 144 (1992) (Petition at p. 25), a case decided the year following *Gregory v. Ashcroft,* in which the Court invalidated various provisions of the Low-Level Radioactive Waste Policy Act. Contrary to petitioner's suggestion, the FPPC relies on the Tenth Amendment to protect powers *not* delegated to Congress but reserved to the States by the Guarantee Clause. Petitioner's argument notably lacks citation either to the Guarantee Clause or to *Gregory v. Ashcroft,* upon which both the FPPC and respondent relied below. (Petition at p. 27). *New York* is consistent with respondent's ruling.

New York held the "take title provision" of the Waste Policy Act "irreconcilable with the powers delegated to Congress by [the Commerce Clause of] the Constitution and hence with the Tenth Amendment's reservation to the States of those powers not delegated to the Federal Government." *Id.* at 183-84. Specifically, the Court found that Congress could not require states to adopt legislation. The Court declined, however, to resolve the merits of the State's claim that this aspect of the PRA also violated the Guarantee Clause. *Id.* at 184. It found that other aspects of the PRA did not "pose any realistic risk of altering the form or the method of functioning of New York's government." *Id.* at 186. It left for another day the question of the justiciability of Article IV, section 4 claims, at the same time that it recognized that it had itself suggested that such questions *are* justiciable. *Id.* at 184.

Here, the Commerce Clause did not delegate to the federal government the Article IV, section 4 powers exercised by and for the benefit of individuals: Californians who by initiative adopted legislation to protect their government from corruption by campaign contributors. That power, reserved to the States through the Guarantee Clause and the Tenth Amendment precludes any deference to Congressional Commerce Clause authority. The opposite conclusion risks "altering the form or method of functioning of California's government," to paraphrase *New York.*

In this case, respondent court correctly determined that where no federal law addresses the State's regulation of its electoral and legislative processes with respect to Indian tribal involvement, the State may properly enforce the PRA against tribes and all other persons equally. Further, "were any federal law to extend the doctrine of tribal immunity to state laws like the PRA, it would impermissibly conflict with the Tenth Amendment and Guarantee Clause of the United States Constitution." (Ruling pp. 11-12)(App. Vol. 5 pp. 1346-1347).

B. SPECIFICALLY, THE POWER TO PROTECT THE INTEGRITY OF THEIR ELECTIONS IS RESERVED TO THE STATES

The United States Supreme Court has recognized that "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections," *Oregon v. Mitchell*, 400 U.S. 112, 124-125 (1970) (footnote omitted) (opinion of Black, J.). Similarly, the authority of the States to determine the qualifications of their government officials is an authority that lies at " 'the heart of representative government.' " *Gregory v. Ashcroft*, 501 U.S. at 463. "It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States 'guarantee[s] to every State in this Union a Republican Form of Government.' U.S. Const., Art. IV, § 4." *Id.*

In *Oregon v. Mitchell*, the Court invalidated a provision of the federal Voting Rights Act of 1965 making eighteen year olds eligible to vote in state and local elections. While the decision has since been abrogated by the 26th Amendment and no opinion commanded a majority, the Court in *Gregory* invoked Justice Black's forceful expression of state sovereign powers*:* "No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices." 400 U.S. at 125.

In *Gregory v. Ashcroft*, the Court upheld a Missouri constitutional provision prescribing the mandatory retirement ages for state judges in the face of a challenge under the Age Discrimination in Employment Act and the Equal Protection Clause of the Fourteenth Amendment. The *Gregory*

Court cited early recognition that the States reserved the power to protect and maintain their governments:

> " '[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,'... '[W]ithout the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

Id. (citing *Texas v. White*, 7 Wall. 700, 725, 19 L.Ed. 227 (1869), quoting *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L.Ed. 101 (1869)).

The inherent sovereignty invoked by the FPPC in this action is expressed in *Gregory's* description of Missouri's decision to establish a mandatory retirement age for state judges:

> [I]t is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. "It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States."

Id. at 460. Just as it is the prerogative of the people of Missouri, "as citizens of a sovereign state" (501 U.S. at 473) to establish the qualifications of their judges, it is the prerogative of the people of California to regulate contributions, including those of large sums of money, to state elections and officials and to require the reporting of expenditures on lobbying activities.

Applying these principles to strike down a federal statute requiring disclosure of expenditures in connection with state and local electoral advocacy, a federal trial court found that the statute violated the Tenth Amendment. *National Federation of Republic Assemblies,* 218 F. Supp. 2d 1300, 1346 (S. D. Ala. 2002), observed:

> *Gregory*[*v. Ashcroft*] confirms that establishing the qualifications of state officeholders falls within the essential, fundamental core of state sovereignty. Establishing the regulations, if any, governing electoral advocacy in connection with the selection of state officeholders is a step removed from this core attribute of state sovereignty, but it is not a large step. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution," and independent expenditures represent "political expression 'at the core of our electoral process.' " [citing *Buckley v. Valeo,* 424 U.S. at 14, 39] Surely this speech is as integral to state and local governments as to their national counterpart and control of it as central to state as to national sovereignty.

California's PRA is similarly integral to the operation of California's system of government and its concern with the corrupting influence of large monetary contributions lies at the core of our electoral process.

C. THE POLITICAL REFORM ACT IS AN EXERCISE OF THE SOVEREIGN RIGHTS AND POWERS OF THE CITIZENS OF CALIFORNIA

Respondent correctly determined that provisions of the PRA requiring large campaign contributors and employers of lobbyists to report their activities "fall squarely within the State's reserved power to regulate its political processes and protect the integrity of its republican form of government." (Ruling at p. 12)(App. Vol. 5 p. 1346). These requirements are designed to assure that the State's political processes are free from the influence of anonymous wealthy interests and that the electorate is informed about such influence when voting for political candidates and

initiative measures. *Id.* The decision to protect the integrity of its elections and legislative processes from the potentially corrupting influence of large monetary contributions is an expression of power reserved to the State through the Tenth Amendment and guaranteed to it by Article IV, § 4. *Cf. Buckley v. Valeo,* 424 U.S. 1, 14 (1976).

In the wake of the Watergate scandal, the People of the State of California enacted the Political Reform Act by initiative in 1974. The PRA seeks to ensure that State and local government "serve the needs and respond to the wishes of all citizens equally, without regard to their wealth." Gov't Code § 81001(a). The concurring opinion in *Albertson's, Inc. v. Young,* 107 Cal. App. 4th 106 (2003), recognizes that adoption of the PRA through the initiative process reflected concern that California has "increasingly become subject to the domination and control of monied special interests, leaving the average citizen without an effective voice in government." *Id.* at 133 (Sims, J. concurring).

The PRA finds, among other things, that lobbyists and organizations that make large contributions to campaigns "gain disproportionate influence over governmental decisions" (§ 81001(c)), that "existing laws for disclosure of campaign receipts and expenditures have proved to be inadequate" (§ 81001(d)), and that "previous laws regulating political practices have suffered from inadequate enforcement" (§ 81001(h)). Purposes of the PRA include (1) fully informing voters and inhibiting improper practices (§ 81002(a)) and providing adequate enforcement mechanisms to public officials and private citizens so that the PRA will be "vigorously enforced" (§ 81002(f)).

Californians have voted on numerous occasions to strengthen the PRA by establishing contribution limits. Proposition 34, adopted by the voters in the November 2000 general election, established those limits after other initiatives succumbed to judicial challenges. Gov't Code §§ 85300 et

seq. In conjunction with setting these new limits, Proposition 34 also increased the administrative penalties for violating the PRA. Gov't Code § 83116(c).

Additional indicia of the voters' determination to protect the integrity of their state government from the corrupting influence of money include the PRA's provision for "vigorous enforcement" (§ 81002(f)), the requirement that the PRA be liberally construed in favor of the purposes of the PRA (§ 81003), and the severe restrictions on the Legislature's power to amend the PRA (§ 81012 (a)). Any amendment to the statute must "further its purposes" and must be passed in each house of the Legislature by a two-thirds vote of the membership. Gov't Code § 81012 (a). Alternatively, the PRA may only be amended or repealed by a statute that "becomes effective only when approved by the electors." Gov't Code § 81012 (b).

The FPPC submitted evidence in opposition to the Tribe's motion to quash demonstrating California's substantial interests protected by the contribution disclosure requirements of the PRA as well as by those provisions requiring disclosure of lobbying activities. The Declaration of past FPPC Chairman Karen Getman showed that *California ProLife Council, Inc. v. Karen Getman et al.*, No. CIV S-00-1698 FCD GGH[1] made this finding. (Getman Dec., Ex. D)(App. Vol. 3, p. 0659). The FPPC's evidence showed voters can and do change their voting behavior when they are informed of the identities of the supporters or opponents of candidates or ballot measures. See Getman Dec. Ex. A and C (Dec. of David Binder, principal in David Binder Research, dated Sept. 29, 2000, ¶¶ 10, 13; and Dec. of David Binder dated Dec. 7, 2001, ¶¶ 10, 21, with exhibits)(App.

[1] This decision has since been affirmed in pertinent part in *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003).

Vol. 3, pp. 0526, 0528) and Ex. B (Dec. of Stephen Hopcraft, President and co-owner of Hopcraft Communications, ¶ 17)(App. Vol. 3, p. 0548). Additional evidence showed information gleaned from publicly filed campaign finance disclosure reports is "absolutely critical" both to voters and the news media, particularly in sorting through claims and counter-claims about ballot measures.

The Declaration of then Secretary of State Bill Jones showed that neutral, nonpartisan application of the PRA's disclosure requirements is essential to accomplishing the PRA's purposes. Further, the democratic process is grossly undermined when voters fail to receive full and timely information about contributions by major contributors. The high public interest is indicated by the Cal-Access web site receiving more than 500,000 "hits" in the months leading up to the March 2002 primary election, giving public access to some 35,000 electronic filings. (Dec. of Bill Jones, Ex. B)(App. Vol. 2, p. 0515).

The United States Supreme Court has recognized such state statutes to be legitimate expressions of state sovereign power to protect the integrity of state elections. For example, in *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377 (2000), the Court upheld a Missouri statute limiting contributions to state candidates. The Court held that *Buckley v. Valeo,* 424 U.S. 1 (1976) (construing provisions of the Federal Election Campaign PRA), is authority for comparable state limits on contributions to state political candidates. 528 U.S. at 381. The Court recognized the State's legitimate and substantial "interests of preventing corruption and the appearance of it that flows from munificent campaign contributions." 528 U.S. at 390. *See also, e.g. Rosario v. Rockefeller,* 410 U.S. 752, 761 (1973) (citing additional cases) (clear that preservation of the integrity of the electoral process is a legitimate and valid state goal); *Libertarian Party v. Eu,* 28 Cal. 3d 535, 542 (1980) (state interest in preserving integrity of

elections is compelling). The *Shrink Missouri* Court concluded: "Even without *Buckley*, there would be no serious question about the legitimacy of these interests, which underlie bribery and antigratuity statutes." 528 U.S. at 899.

Similarly, *Institute of Governmental Advocates v. Fair Political Practices Com'n*, 164 F. Supp. 2d 1183, 1194-95 (E.D. Cal. 2001), recognized that the state's interest in preventing corruption supported limitations on contributions by lobbyists. (Getman Dec., Ex. E)(App. Vol. 3, pp. 0680-0681). *Fair Political Practices Commission v. Superior Court*, 25 Cal. 3d 33, 46-49 (1979), upheld the lobbyist registration and reporting requirements of the PRA, finding the State had a "valid interest in determining the source of voices seeking to influence legislation and could reasonably require the professional lobbyist to identify himself and disclose his lobbying activities" as well as "disclosure of financial activities of persons engaged in political processes." *Id.* at 47.

As a matter of fact and of law, there can be no doubt of the State's interest in protecting the integrity of its elections and legislative processes, subject only to limitation by the United States Constitution, as discussed in *Buckley v. Valeo*. There can be no doubt California voters exercised sovereign powers integral to operation of their government and reserved to the States through the Tenth Amendment and the Guarantee Clause when they adopted the PRA. This statute, aimed at the potentially corrupting influence of money on elections and legislative processes, promotes interests within the "essential, fundamental core" of state sovereignty. Without application to tribal contributors, the problem would become immeasurably worse. (Dec. of James Knox, ¶ 17)(App. Vol. 3., p. 0714).

D. CONGRESSIONAL INTERFERENCE WITH REGULATION OF STATE ELECTIONS CANNOT BE INFERRED

To protect the federal system of dual or joint sovereigns the Court has articulated a "plain statement rule" applicable to "traditionally sensitive areas, such as legislation affecting the federal balance." *Gregory*, 501 U.S. at 461. *Gregory v. Ashcroft* applies the plain statement rule in the context of the Guarantee Clause and the Tenth Amendment. Quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985), the Court expressed the rule:

> "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute."

Id. at 460-61. The plain statement rule applies to the unique arena of state decisions that "go to the heart of representative government." As has been shown, regulating the influence of money on elections and legislative processes is as much at the heart of representative government as would be the selection of judicial retirement ages.

No federal statute specifically addresses or purports to restrict State regulation, including application of judicial enforcement mechanisms, of tribal contributions to State and local elections and public officials. Of course, if the Tribe were a foreign nation for purposes of the PRA, the Federal Election Campaign Act (FECA) would bar it altogether from making campaign contributions. 2 U.S.C. §§ 441, 611 (a). The FECA proscription is incorporated into the PRA by Government Code section 85320. Further, according to the recent Congressional Research Service Report to Congress, under the McCain Feingold Bipartisan Campaign Reform Act of 2002 (P.L. 107-155; Mar. 27, 2002) (BCRA), Indian tribes, like other "persons," would be subject to the new, increased contribution

limits and would not be permitted to make soft money contributions to political parties.

Certainly the Indian Commerce Clause, Art. I, § 8, cl. 3, does not constitute a "plain statement" of delegation to Congress of authority over Indian participation in state governments. The States could not have understood that in delegating plenary authority over Indian Commerce to Congress, they gave up powers reserved to the States under Article IV, § 4 and the Tenth Amendment vis a vis Indian tribes. This is primarily so because Indians, as non-citizens, had no right to participate in state electoral and legislative processes when these constitutional provisions were debated and adopted. Even after adoption of the 15th Amendment to the United States Constitution, Indians who had not severed tribal ties had no right to vote and did not become citizens until the General Allotment Act of 1924. 43 Stat. 253 (codified at 8 U.S.C. § 1401 (b)).

In a comparable context, the United States Supreme Court concluded that the States could not have understood that they surrendered their Eleventh Amendment immunity from suit to tribes by virtue of adopting Article III of the United States Constitution. The Court held that Article III did not constitute a plain statement of such intent. *Seminole Tribe of Florida v. Florida,* 517 U.S. at, 67-68 (citing cases)(we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States).

In the Eleventh Amendment context, the Court has also specifically held that Congressional silence does not satisfy the requirement of an unmistakable statutory expression of intent. *See generally, e.g. Welch v. Texas Dept. of Highways and Public Transp.,* 483 U.S. 468, 476-478 (1987) (because of the role of the States in our federal system, "[a] general

authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.")

By a parity of reasoning with *Seminole Tribe* and *Welch*, a literal application of the words of cl. 3, § 8, Article I cannot have embraced Congressional authority over tribal participation in state and local elections and legislative processes, thereby vitiating powers reserved and protected by Article IV, § 4 and the Tenth Amendment. Nor can Congressional silence on the issue satisfy the requirement of a plain statement of intent to circumscribe powers reserved to the states.

Relying on *Gregory v. Ashcroft*'s application of the plain statement rule in the context of Article IV, section 4 and the Tenth Amendment, respondent court properly found that no federal law addresses the State's regulation of its electoral and legislative processes with respect to Indian tribes. Further, were any federal law to extend the doctrine of tribal immunity to state laws like the PRA, it would impermissibly conflict with the Tenth Amendment and the Guarantee Clause of the United States Constitution. (Ruling pp. 11-12)(App. Vol. 5, pp. 1346-1347).

The following section of this brief shows that no precedent applying the federal common law doctrine of tribal sovereign immunity from suit bars enforcement of the PRA against the Tribe.

III. THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY FROM SUIT DOES NOT BAR ENFORCEMENT OF THE PRA

Separate and apart from the State's Guarantee Clause and Tenth Amendment protections, tribal sovereign immunity from suit has never been held to allow unregulated Indian tribal participation in state electoral and legislative processes, nor to preclude judicial enforcement of state statutes and regulations governing such participation.

The FPPC asserts that the common law doctrine of tribal sovereign immunity from suit does not extend to bar enforcement of state laws essential to preserving the republican form of government guaranteed to the States by Article IV, § 4 of the United States Constitution and the Tenth Amendment. The Tribe asserts that the FPPC must show an "exception" to the common law doctrine. To the contrary, the Tribe must show that a doctrine based on deference to Congressional authority over Indian Commerce extends to an arena where the States did not surrender their own sovereignty, and bars enforcement of the PRA against the largest contributors to state elections and public officials. It does not.

A. TRIBAL SOVEREIGNTY DOES NOT PRECLUDE NONDISCRIMINATORY STATE REGULATION OF CONDUCT THAT CORRUPTS STATE ELECTIONS AND LEGISLATIVE PROCESSES

In this case, the Tribe does not expressly acknowledge nor expressly deny that the State has the power to *regulate* tribal contributions to state and local elections. Indeed, it seems implicitly to concede that it is bound by the State's regulations. (Petition at p. 24). This court's decision should declare that the FPPC has *both* the power to regulate and the power to enforce, as respondent found.

The FPPC agrees that the Tribe enjoys unique status in the state/federal system as a "domestic dependent nation." *See Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 16 (1831). Tribes are not parties to the United States Constitution and are not states within the meaning of the Constitution. *See e.g. Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 191-92 (1989).

Tribal sovereignty is of a "unique and limited character[] [and] exists only at the sufferance of Congress and is subject to complete defeasance." *United States v. Wheeler,* 435 U.S. 313, 323 (1978). Congress' exercise of

that power limits the reach of state authority, in order to protect the right of tribes to make their own laws and to be ruled by them. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (quoting from *Williams v. Lee*, 358 U.S. 217, 220 (1959)). This case in no way implicates those rights nor threatens that unique status. On the other hand, it implicates and protects the corresponding reserved rights of the States.

At the same time, Indian tribes are "prohibited from exercising . . . powers 'inconsistent with their status.'" *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

The off-reservation conduct of tribes, absent a Congressional directive limiting state authority, falls within the regulatory reach of states. "Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); *see also, Boisclair v. Superior Court*, 51 Cal. 3d 1140, 1158 (1990) (if primary situs of acts is outside Indian territorial boundaries, tribal defendants have acted beyond their sovereign authority and are not protected by sovereign immunity). Respondent appropriately relied on these authorities for this proposition. *Compare* Ruling at p. 11 (App. Vol. 5 p. 1346) *with* Petition at p. 29 (asserting that respondent relied on these decisions to balance interests).

It is indisputable that this action involves "off-reservation conduct." The FPPC's evidence submitted in opposition to the motion to quash demonstrated the Tribe's intent to affect voters and legislators beyond their reservation borders and to affect public policy beyond tribal interests *per se*. All of this activity is regulated by the PRA. As shown by the Declaration of Common Cause Executive Director James Knox, by the late 1990's tribes and tribal members had become active both in voter-initiated and legislative lawmaking. (Dec. of James Knox, ¶ 19)(App. Vol. 3, p.

0715). The report attached to the Knox declaration and the Declaration of Dan Schek and attached exhibits show that the Tribe is a large and pervasive contributor to state campaigns and initiatives, including such initiatives as Proposition 34, which substantially reformed the PRA, and Proposition 45, the term limits initiative, both of which fundamentally changed California governmental processes. (Dec. of James Knox, Ex. B)(App. Vol. 3, p. 0724); (Dec. of Dan Schek, ¶ 8, Ex. A)(App. Vol. 3, pp. 0704, 0706). The only burden the PRA imposes on the Tribe is the same burden imposed without discrimination on all other campaign contributors and lobbyist employers.

It follows that the Tribe's campaign contributions and support of lobbying activities are subject to regulation on the same basis as any other "person" under the PRA. *See Mescalero Apache Tribe v. Jones*, 411 U.S. at 148; *see also, Boisclair v. Superior Court*, 51 Cal. 3d at 1158.

The question, then, is whether the State's power to regulate includes the power to enforce its regulations through state court litigation, as respondent found, or whether the common law doctrine of tribal sovereign immunity from suit bars this action.

B. THE POWER TO REGULATE NECESSARILY INCLUDES THE POWER TO ENFORCE THE PRA - NO BALANCING OF INTERESTS IS INVOLVED

Respondent correctly determined that, without the ability to enforce the PRA, California's right to regulate potentially corrupting contributions would be meaningless. (Ruling p. 11)(App. Vol. 5, p. 1346).

The Tribe errs in arguing that respondent improperly "balanced" interests between the Tribe and the State. The ruling does not purport to find support in a balancing of tribal interests against sovereign state interests. (Petition at p. 28).

To the contrary, respondent and the FPPC addressed the State's interests underlying the PRA, not for the purpose of balancing them against the Tribe's interests, but to show that the PRA is a valid exercise of the State's power to regulate its elections. The FPPC made the type of evidentiary showing that *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 393 (2000), held sufficient under *Buckley v. Valeo* standards to support a state statute limiting campaign contributions. It was the same type of showing (and largely the same evidence) as the FPPC submitted in the *Pro-Life Council* case. All of this evidence addresses potential infringement on the First Amendment interests of contributors, whether of tribal or any other origin. The evidence supports application of the PRA without discrimination to all contributors, not simply to tribes.

Similarly, the FPPC pointed out the obvious: there is no tradition of sovereignty or sovereign immunity with respect to tribal or tribe member involvement in state elections or legislative processes. Again, the point is not to balance interests but to show that this case has no impact on those interests of tribal self-governance assiduously protected by Congress and addressed by many federal precedents.

Where tribes have no tradition of sovereignty and where state sovereign interests are extraordinary, even in the absence of an express delegation to authority by Congress, the courts have recognized that a necessary incident of the power to regulate is the power to enforce. For example, *Fort Belknap Indian Community of Fort Belknap Indian Reservation v. Mazurek,* 43 F.3d 428 (9th Cir. 1994), *cert. denied* 516 U.S. 806 (1995), dealt with the regulation of liquor *in* Indian Country. Since there is no tradition of Indian sovereignty in this arena, "little if any weight" would be accorded to asserted interests in tribal sovereignty. *Id.* at 433. The court in *Fort Belknap* reasoned that, without the power to prosecute

violations, the state authority to regulate would be meaningless and the state's high interest unprotected. *Id.* at 434.

The same reasoning applies to the "unusual subject" of inherent state authority to govern and protect the integrity of its elections and legislative processes. At least one other state has refused to enjoin enforcement of its campaign contribution laws against a tribal campaign committee. *Minnesota State Ethical Practices Board v. Red Lake DFL Committee,* 303 N.W.2d 54 (Minn. 1981).

Respondent correctly determined that enforcement of the PRA would infringe upon no aspect of tribal self-government. There is no traditional backdrop of sovereign authority and the state's interests could not be higher: Article IV, section 4 power to supervise its own elections, subject only to constitutional limitation, is the essence of state sovereignty.

On the other hand, if California were without authority to enforce its regulations, the Tribe could corrupt state government with impunity, as shown by the Declaration of Bob Stern. (Dec. of Bob Stern, ¶¶ 15-17)(App. Vol. 2, p. 0418). As in *Fort Belknap,* by necessity the right to regulate, includes the right to enforce in state court. Because of the Guarantee Clause and the Tenth Amendment, the lack of express Congressional authority is not dispositive.

If Congress were to act to *limit* the State's authority, "such federal law would intrude upon the State's exercise of its reserved power under the Tenth Amendment to regulate its electoral and legislative processes and would interfere with the republican form of government guaranteed to the State by Article IV, section 4 of the United States Constitution." (Ruling at p. 12)(App. Vol 5, p. 1347).

No precedent supports the result advocated by the Tribe. Unlike the situations involving tribal transactions with private individuals or entities, where tribal courts exist as an alternative forum for dispute resolution, there

is no alternative forum and no remedy available, unless the PRA is enforced in state court.

C. THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY FROM SUIT RELIES ON COURT DEFERENCE TO CONGRESSIONAL COMMERCE AUTHORITY INAPPLICABLE HERE

The federal common law doctrine of immunity from suit developed out of early United States Supreme Court decisions describing the nature of tribal sovereignty. Indian tribes were "domestic dependent nations" whose sovereignty pre-existed the formation of the United States. That sovereignty was subject to abrogation or diminution only by the federal government, not by the States. *See Cherokee Nation v. Georgia,* 30 U.S. 1 (1831); *Worcester v. Georgia,* 31 U.S. 515, 530, 561 (1832). Citing *Worcester,* the Supreme Court has said that the sovereignty of Indian tribes is derived from their pre-existing indigenous rights to land and powers of self-governance. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 55 (1978).

Tribal sovereign immunity from suit has been described as an attribute of those powers of self-governance. *See Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Oklahoma,* 493 U.S. 505, 509 (1991) (Indian tribes are domestic dependent nations that exercise sovereign authority; suits against the tribes are thus barred by sovereign immunity); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.,* 476 U.S. 877, 890-91 (1986) (common law sovereign immunity possessed by an Indian tribe is a necessary corollary to Indian sovereignty and self-governance); *United States v. United States Fidelity and Guaranty Co.,* 309 U.S. 506, 512 (1940) (tribes exempt from suit under "public policy that exempted dependent as well as dominant sovereignties from suit without consent").

The authors of the decisions from which the immunity doctrine arose could not have contemplated that the States gave up their powers to protect their own rights of self-governance as a consequence of this "public policy" protection for tribal self-governance. The grant of full citizenship to Indians in 1924 was not envisioned or imaginable in the era in which tribal sovereign immunity first described neat, non-intersecting spheres of federal/Indian and state jurisdiction. None of the Court's subsequent decisions has applied the doctrine in such a fashion.

Most recently, *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998), reviewed the legal basis of the doctrine and expressed misgivings about its adequacy to support the doctrine's current broad application. The Court noted that the doctrine was a creation of the Court and developed "almost by accident." *Id.* at 760.

Kiowa, for the first time, extended the doctrine of tribal sovereign immunity from suit to "off-reservation" commercial conduct. Three dissenting justices criticized the Court for suggesting that precedent supported this extension:

> Despite the broad language used in prior cases, it is quite wrong for the Court to suggest that it is merely following precedent, for we have simply never considered whether a tribe is immune from a suit that has no meaningful nexus to the tribe's land or its sovereign functions. Moreover, none of our opinions has attempted to set forth any reasoned explanation for a distinction between the States' power to regulate the off-reservation conduct of Indian tribes and the States' power to adjudicate disputes arising out of such off-reservation conduct.

523 U.S. at 764 (Stevens, J., dissenting). The dissenters cautioned that Court's judge-made law is unjust. "Governments, like individuals, . . . should be held accountable for their unlawful, injurious conduct." *Id.* at 765-66. The Court's earlier decisions had concerned activities affecting tribal self-governance and economic development, not activities affecting

the governance of a sovereign state of which the Tribe's members are citizens. *See e.g. Potawatomi,* 498 U.S. 505 (immunity from suit to enforce tribe's obligation to collect tax on cigarette sales on tribal lands).

Kiowa, involving an action to enforce a promissory note, declined to revisit or narrow the Court's earlier decisions. Instead, relying on the Indian Commerce Clause, the Court deferred to Congress as the appropriate branch of the federal government to determine the extent to which tribal sovereign immunity from suit should be abrogated or restricted. *Id.* at 760; *see also Potawatomi,* 498 U.S. at 510 (noting that the doctrine of tribal sovereign immunity announced by the Court was within congressional authority to abrogate; Congress has consistently approved the doctrine and authorized suits against tribes only in limited circumstances). *Kiowa* extended court-created tribal immunity to "suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Id.* at 760.

This court followed *Kiowa* in *Redding Rancheria v. Superior Court*, 88 Cal. App. 4th 384, 387 (2001), a case involving off-reservation tortious conduct of a tribal casino employee at a tribe-sponsored function. In this context this court stated that the power to regulate is not the same as the power to sue.

As broad as its holding is phrased, *Kiowa* says nothing about tribal sovereign immunity from suit in connection with tribal participation in a state's political processes or affecting sovereign powers reserved to the States by the Guarantee Clause and the Tenth Amendment.

Here, in contrast to the situations in *Kiowa* and *Redding Rancheria*, the Guarantee Clause and the Tenth Amendment remove any basis for deference to Congress. Based on the authorities discussed above, respondent properly found that Congress has no authority in this arena of reserved powers fundamental to the protection of state sovereign

governments. *Kiowa* itself recognizes that Congressional authority over tribes is "subject to constitutional limitations." 523 U.S. at 759. In this case of first impression, respondent court recognized that this action to enforce the PRA presents an example of those "constitutional limitations": the Guarantee Clause and the Tenth Amendment.

D. THE DECISIONS UPON WHICH PETITIONER RELIES DO NOT EXTEND TO THE CONTEXT OF THIS ACTION

Other than *Kiowa* (and *Redding Rancheria*), the cases relied on by the Tribe below each related to the question of state court jurisdiction over disputes having to do with on-reservation activity implicating sovereign rights of self-government. The FPPC recognized that, in these areas, the state's power to regulate has not been co-extensive with its power to enforce.

For example, *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F. 2d 416, 418 (9th Cir. 1989) (Petition p. 13), dealt with enforcement of a bingo ordinance enacted by the Tribe. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), held that the State had no authority to apply ordinances regulating bingo and prohibiting the playing of draw poker and other card games inside reservations. *Cabazon* also states that the Court has not established "an inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent." *Id.* at 214-15. *People ex rel. Dept. of Transportation v. Naegele Outdoor Advertising Co.*, 38 Cal. 3d 509 (1985) (Petition at p. 14), held that state regulation of outdoor advertising on Indian reservations was preempted by the operation of federal law. *California v. Quechan Indian Tribe*, 595 F. 2d 1153 (9th Cir. 1979) (Petition at p. 18), dealt with enforcement of fish and game laws *on* a reservation. *Middletown Rancheria of Pomo Indians v. Workers'*

Compensation Appeals Board, 60 Cal. App. 4th 1340 (1998) (Petition at p. 19), dealt with the enforcement of workers compensation laws against a tribal commercial entity (a casino) operated *on* a reservation.

On appeal, the Tribe cites additional precedents that do not extend to the fact situation presented by this case. In *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F.Supp.2d 1131 (N. D. Okla. 2001) (Petition at p. 13), the trial court found that an Indian tribe's business development agency shared in the tribe's sovereign immunity from suit for copyright infringement. Recognizing that some of the conduct may have occurred off-reservation, the court applied the federal copyright statute, which contains no statement of Congressional authorization of judicial enforcement against tribes in state or federal court. *Id.* at 1140. No such federal statute exists in the context of this case; nor would it withstand Tenth Amendment scrutiny if it did. With respect to copyright law, Congress has plenary authority to act and has not done so. *See also, Dawavendewa v. Salt River Project Agricultural Improvement and Power District*, 276 F.3d 1150 (9th Cir. 2002) (Petition at p. 17) (barring Title VII suit against Navajo Nation concerning hiring policies of power district doing business on reservation lands); *Long v. Chemehuevi Indian Reservation,* 115 Cal. App. 3d 853 (1981) (Petition at p. 19) (28 U.S.C § 1360 does not give state court jurisdiction over tribe itself in wrongful death action).

American Vantage Companies, Inc. v. Table Mountain Rancheria, 292 F.3d 1091 (9th Cir. 2002) (Petition at p. 14), involving an express contractual waiver of tribal sovereign immunity, determined that a tribe is not a "citizen" for purposes of federal court diversity jurisdiction over a breach of contract suit arising out of the operation of a casino on tribal lands. The decision contains an interesting discussion suggesting tribes owe no allegiance to a state. *Id.* at 1096. But the case still involves, and

relies on precedent dealing with, application of state law within the territory of an Indian tribe. *Id.* Extension of the decision's "citizenship" discussion to this case would yield anomalous results. First, it would suggest that tribes should be treated like foreign sovereigns and precluded altogether from making campaign contributions to local and state elections and public officials. Second, it would suggest that state and local candidates for office and elected officials who are also tribal officials could not lawfully take oaths of state office, and would be exempt from, for example, conflict of interest regulations governing their state positions. Again, these are interesting questions for another day.

Puyallup Tribe v. Department of Game of Wash., 433 U.S. 165 (1977) (Petition at p. 14), a 4-3 decision, reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation, on and off-reservation. However, the Court vacated the portion of the lower court's ruling granting declaratory relief against the Tribe itself, as opposed to the portions enforcing the laws against tribal members. The Court held that "[t]he state courts must continue to accord full respect to the Tribe's right to participate in the [state court] proceedings on behalf of its members as it has in the past without treating such participation as qualifying its right to claim immunity as a sovereign." *Id.* at 178. Justice Blackmun, concurring, opined that the doctrine of tribal immunity "may well merit re-examination in an appropriate case." *Id.* at 179 (Blackmun, J. concurring). The dissenting justices opined that the specific treaty in question required a different result. Again, the nature of the state powers involved and the clear application of the Indian Commerce Clause to the subject matter of *Puyallup*, distinguish the case and make it inapplicable to this action. See Respondent's ruling at p.7. (App. Vol. 5, p. 1342).

Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877, 884 (1986) (Petition at p. 35), because it relies on a "weighty federal interest" in ensuring that all citizens have access to State court (*id.* at 889), combines aspects of *American Vantage* and *Puyallup*. On the one hand, tribes could not be required to waive immunity from suit as a condition of access to state courts. On the other hand, the Court obtained the concession during oral argument (*id.* at 891) that tribal immunity did not extend to protection from the normal processes of the state court in which the Tribe has filed suit. No "waiver" was required to subject the Tribe to those processes, contrary to the petitioner's suggestion. Nor is any "waiver" required to subject the Tribe to the PRA, including its enforcement mechanisms.

Finally, *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505 (1991) (Petition at pp. 14-15), involved a valid state tax on on-reservation sales of cigarettes. Although the Court held that the state's counterclaim was barred, it decided the merits. The Court analyzed federal statutes relating to tax assessments on tribes and concluded:

> Congress has consistently reiterated its approval of the immunity doctrine. See, e.g., Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. 1451 et seq., and the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. 450 et seq. These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." . . . Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.

Id. at 510 (emphasis added). Justice Stevens' concurring opinion emphasized that the Court's holding rejected the argument that the Tribe was completely immune from legal process:

> By addressing the substance of the tax commission's claim for prospective injunctive relief against the Tribe, the Court today recognizes that a tribe's sovereign immunity from actions seeking money damages does not necessarily extend to actions seeking equitable relief.

Id. at 515-16 (Stevens, J. concurring). Respondent properly distinguished this decision based on the Court's reliance on congressional authority over Indian commerce. (Ruling at p. 7) (App. Vol. 5, p.1342).

Unlike the situations considered in these cases, including *Kiowa* and *Redding Rancheria*, Congress is not in a "superior position" to "weigh and accommodate competing policy concerns" and is not "at liberty" to determine the extent of tribal authority. (Petition at p. 20). At stake here is the State's sovereign powers over the integrity of its own elections and legislative processes. Since there is no basis for deference here to Congress, there is no basis for extending the Court-created doctrine of tribal sovereign immunity from suit, as respondent correctly found.

IV. ALTERNATIVES TO JUDICIAL ENFORCEMENT OF THE PRA ARE UNAVAILABLE TO THE FPPC

The FPPC has shown and respondent properly found that enforcement of the PRA is a valid exercise of Article IV, section 4 reserved powers. No federal statute purports to bar judicial enforcement of state laws protecting the integrity of state elections and no such Congressional intent may be inferred from a lack of express authorization. Congressional regulation in this arena would violate the Tenth Amendment. Further, the FPPC has shown, and respondent found, that the Court-created doctrine of tribal sovereign immunity from suit does not extend to enforcement of the PRA.

Moreover, contrary to the Tribe's final argument (Petition at p. 37), alternatives to judicial enforcement are unavailable to the FPPC. First,

Article III, section 3.5 of the California Constitution precludes the FPPC from refraining to enforce the PRA based on its own assessment of the statute's constitutionality. The statute itself requires the FPPC to "vigorously enforce" it against all violators. Gov't Code § 81002(f).

Second, the FPPC's authority is limited to the authority conveyed by the statute. Government Code section 91001(b) makes the Commission "responsible for enforcement of the civil penalties and remedies of this title." The scope of an administrative agency's authority is only as broad as the authority statutorily conferred upon it. *See Agricultural Labor Relations Board v. Superior Court*, 16 Cal. 3d 392, 419-20 (1976); *City and County of San Francisco v. Padilla*, 23 Cal. App. 3d 388, 400 (1972). If an administrative agency takes action beyond its statutory authority, it is void. *Id.*

"Subject to any applicable statutory framework and the public interest" the FPPC has implied authority to settle civil disputes. *See generally, Stermer v. Board of Dental Examiners,* 95 Cal. App. 4th 128, 133 (2002). A "government to government" agreement such as the Tribe suggests (Petition at p. 37) is, however, beyond the statutory authority of the FPPC. The Tribe cites no support for the broad proposition that "nothing prevents the FPPC" from negotiating such an agreement. *Id.* Given the statutory constraints on amendment or repeal of the PRA (Gov't Code § 81012 (b)), it is unclear that any branch of the state government has such authority.

Nor does the record support the argument that the FPPC has the "option" to obtain the required information either from the Tribe on a voluntary basis or from the candidates and lobbyists who receive and must report regulated contributions and payments. (Petition at p. 37). The Declarations of Alan Herndon, Chief Investigator for the Enforcement Division of the FPPC and Dan Schek, Investigator III of the FPPC and

attached exhibits show that it is not possible to know the true extent of tribal contributions or lobbying activity, unless the Tribe complies with the PRA's disclosure requirements. (Dec. of Alan Herndon, ¶¶ 5-7, Ex. A) (App. Vol. 3, pp. 0694-0695, 0699-0700); (Dec. of Dan Schek, ¶ 3) (App. Vol. 3, p. 0702). Nor can the FPPC accurately audit recipients' compliance. (Dec. of Alan Herndon, ¶ 8) (App. Vol. 3, p. 0696). Certainly voters cannot make informed decisions, when reports are untimely or incomplete.

The Declaration of James Knox shows that it is very difficult, expensive and time-consuming to try to derive the influence of any major contributor by combing through the reports of recipients. (Dec. of James Knox, ¶ 15)(App. Vol. 3, p. 0714). The Declaration of Mark Krausse, Executive Director of the Fair Political Practices Commission, shows that it is difficult, if not impossible, to track lobbying efforts without lobbyist employer reports. Indeed, of the 37 measures the Tribe lobbied in the most recent legislative session, its position was listed in the bill analysis of only one, SB 1828 (Burton). (Dec. of Mark Krausse, ¶ 10)(App. Vol. 3 p. 0758).

In short, when a tribe such as petitioner acknowledges that it is subject to state regulation but refuses to comply, judicial enforcement of the PRA is the only "option" available to the FPPC constitutionally, statutorily and practically. All of the suggested "alternatives" completely undermine the powers exercised by Californians when they adopted the PRA through the initiative process.

Although the State may seek legislation from Congress (Petition at p. 38), this is no "alternative" to exercising its reserved powers. Such a solution connotes that the State's power to protect the integrity of its elections is subject to Congressional control, contrary to the holding in *Gregory v. Ashcroft.*

CONCLUSION

Respondent court correctly applied these principles of federal law to deny the Tribe's motion to quash based on the Court-created doctrine of tribal sovereign immunity from suit.

However, the FPPC agrees with the Tribe that the issues presented by its petition should be resolved by this court. The FPPC must, unless or until enforcement of the PRA against Indian tribes is determined to be unconstitutional as applied, enforce the statute equally against all who violate its provisions. Cal. Const. Art. III, § 3.5. Nothing less than the State's ability to protect its sovereign form of government is at stake.

The FPPC urges this court not to adopt the petitioner's proffered extension of the doctrine of tribal sovereign immunity in derogation of the State of California's constitutionally secured sovereign rights and powers protected by the Guarantee Clause and the Tenth Amendment to the United States Constitution. The FPPC recognizes that this is a case of first impression, in that no case has addressed the scope of the doctrine of tribal sovereign immunity in this context. It can be anticipated that the petitioner and other federally recognized Indian tribes will continue to be very active in areas governed by the PRA, including during the upcoming gubernatorial recall election. Tribal sovereign immunity as a defense to FPPC enforcement actions of the PRA will be an ongoing point of contention until these questions are authoritatively resolved by this court.

For all of the reasons and based on the authorities cited, the court should affirm respondent court's ruling and deny the petition.

Dated: August _____, 2003

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 14(c), counsel for Plaintiff and Real Party in Interest hereby certifies that this brief is proportionately spaced in Times New Roman 13 point type, consisting of 11,402 words.

Dated: August _____, 2003

Respectfully submitted,

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Riegels, Campos & Kenyon, LLP, 2500 Venture Oaks Way, Suite 220, Sacramento, CA 95833. On _____, 2003, I served the following document(s) by the method indicated below:

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Clerk, Sacramento County Superior Court Hon. Michael T. Garcia, Presiding Judge 720-9th Street, Dept. 47 Sacramento, CA 95814-1398	Respondent, Sacramento County Superior Court
Clerk, Sacramento County Superior Court Hon. Loren E. McMaster 800 9th Street, Dept. 53 Sacramento, CA 95814-2686	Trial Court Case No. 02AS04545
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☒ by transmitting via facsimile on this date from fax number (916) 779-7120 the document(s) listed above to the fax number(s) set forth below. The transmission was completed before 5:00 p.m. and was reported complete and without error. The transmitting fax machine complies with Cal.R.Ct 2003(3).

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on _____, 2003, at Sacramento, California.

_____

FAUN CATANZARITE